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SERVICE DATE – FEBRUARY 15, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33980

RIVERVIEW TRENTON RAILROAD COMPANY
–ACQUISITION AND OPERATION EXEMPTION–
CROWN ENTERPRISES, INC.

STB Finance Docket No. 34040

RIVERVIEW TRENTON RAILROAD COMPANY – PETITION FOR AN EXEMPTION
FROM 49 U.S.C. 10901 TO ACQUIRE AND OPERATE A RAIL LINE IN WAYNE
COUNTY, MI

Decided: February 14, 2002

We are revoking the exemption for the proposal that was the subject of a notice filed by the Riverview Trenton Railroad Company (RTR) in STB Finance Docket No. 33980 and asking for additional evidence regarding the same proposal in STB Finance Docket No. 34040.

BACKGROUND

By notice filed on December 13, 2000, in STB Finance Docket No. 33980, served and published in the Federal Register on January 8, 2001, at 66 FR 1371, RTR invoked our class exemption procedures at 49 CFR 1150.31 to acquire and to operate track in Riverview and Trenton, in Wayne County, MI. RTR proposes to operate over: (1) its own track, comprising about 1.5 miles of rail line within a 76-acre parcel that RTR purchased from its noncarrier parent, Crown Enterprises, Inc. (Crown);¹ and (2) via easement, track within an adjacent 195.45-acre

¹ Crown is a real estate development subsidiary of CenTra, Inc. (CenTra). CenTra is a holding company that also owns several transportation companies, including a trucking company, Mason Dixon Lines, Inc. In CenTra, Inc., et al. – Continuance in Control Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33979, CenTra filed a notice of exemption on December 13, 2000 to allow its common control of RTR (when RTR becomes a rail carrier) and the Jefferson Terminal Railroad Company (Jefferson), another subsidiary of Crown. In Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal), we

(continued...)

industrial site owned by a non-affiliate, Detroit Steel Center, Ltd. (DSC).² DSC operates a steel mill on its property. DSC traffic currently moves over the easement portion of the track and was moving over this portion prior to its acquisition by RTR.³ DSC has retained an easement to continue to operate over RTR's track. RTR plans to establish an intermodal terminal for rail, motor, and barge traffic and also plans to transport DSC's traffic.

RTR claims that it has initiated discussions with other railroads for the interchange of traffic. The track in RTR's 76-acre parcel physically connects at two points with track owned by the Grand Trunk Western Railroad Incorporated (GTW).⁴ RTR claims that, after appropriate interchange arrangements are made, it will have access to track of the Consolidated Rail Corporation (Conrail) Detroit Shared Assets Area.⁵

By letter dated January 4, 2001, and filed with the Board on January 8, 2001, RTR provided additional information. RTR elaborated on its corporate relationships and its future operating and business plans. RTR also stated that the property involved is the subject of a potential condemnation action by Wayne County, but that no such action had been filed in any court as of the date of that letter.

¹(...continued)

subsequently precluded Jefferson from acquiring certain track in Detroit from Crown under the class exemption procedures, based upon a pleading filed by the City of Detroit.

² RTR's 76-acre parcel and the adjacent parcel owned by DSC were formerly owned by the McLouth Steel Company (McLouth), which used the track to service its plant. The property to be acquired by RTR is referenced as the McLouth Track.

³ In an affidavit submitted to a court, Canadian National Railway Company (CN) witness James M. Kvedaras stated (at 2): "To the best of my knowledge, the Detroit Steel Center ("DSC") facility that is located there receives, on average, a regular but low volume of traffic from CN, over the southern spur." See Wayne County's Petition to Revoke, Tab K.

⁴ The connection at the south end of the property is active, passing over a street. The paved-over, street level connection at the north end may require track reconstruction to become operable. See the statement of James M. Kvedaras, supra note 3, and the photographs in the Environmental Assessment served on October 15, 2001.

⁵ Pursuant to our decision allowing division of the operations and properties of Conrail between Norfolk Southern Railway Company (NS) and CSX Transportation, Inc. (CSXT), Conrail continues to operate this track in the Detroit area for the benefit of both NS and CSXT. See CSX Corp. et al. – Control – Conrail Inc. et al., 3 S.T.B. 196 (1998).

By letter dated January 9, 2001, and filed with the Board on January 16, 2001, RTR gave us a copy of a letter dated November 28, 2000, from a firm representing Wayne County, announcing a potential condemnation action and requesting information on the property. On April 18, 2001, RTR filed a letter notifying us that the United States District Court for the Eastern District of Michigan had preliminarily enjoined Wayne County from exercising its condemnation authority or zoning regulation with respect to RTR's property, citing federal preemption under 49 U.S.C. 10501(b).⁶

By petition filed on February 16, 2001, Wayne County requests that the exemption be declared void ab initio and/or revoked. Wayne County argues that the notice was void under our regulations at 49 CFR 1150.32(c) because RTR submitted false and misleading information. Wayne County accuses RTR of improperly invoking Board jurisdiction over the property in order to avoid condemnation. The County also challenges our jurisdiction over the proposed operation (and thus our jurisdiction to exempt it) on two grounds: (1) that RTR's track will be excepted "spur, industrial, team, switching, or sidetrack" track under 49 U.S.C. 10906; and (2) that RTR is not subject to our general jurisdiction under 49 U.S.C. 10501 because it would not provide transportation as a rail common carrier. Even if these arguments fail, according to the County, the class exemption must be revoked under the statutory criteria for revocation in 49 U.S.C. 10502(d). The County argues that these criteria require us to focus on "overriding public interest" considerations, which the County identifies here as the effects that RTR's operation would have on traffic, public safety, and the general quality of life.

On March 8, 2001, RTR filed a reply in opposition to the arguments raised in Wayne County's petition to revoke. RTR also filed a separate motion under 49 CFR 1104.14 for a protective order to allow a document, Exhibit 1 to the statement of B. Michael Blashfield, to be filed under seal. RTR's motion was granted by decision served on April 24, 2001.

On March 9, 2001, GTW filed a petition in support of Wayne County's petition to revoke the exemption. GTW further develops the issues advanced by Wayne County and adds an argument of its own, i.e., that our class exemption procedure is not intended to allow start-up companies like RTR to revive "largely dormant" rail trackage and develop it into a much bigger operation. According to GTW, allowing RTR to obtain authority under the class exemption would enable it to avoid environmental review of the new intermodal operation proposed in the notice. To allow proper investigation of environmental issues, facts pertaining to our jurisdiction over the transaction, and its effect on GTW's operations, we must, according to GTW, vacate the exemption and require RTR to file either an application to construct a line of railroad under 49 U.S.C. 10901 or a petition for exemption from that provision pursuant to 49 U.S.C. 10502 and 49 CFR 1121.

⁶ Riverview Trenton Railroad Company v. County of Wayne, Case No. 01-70078, U.S. District Court for the Eastern District of Michigan (Apr. 10, 2001).

Additional petitions to revoke the exemption were filed by the City of Riverview (Riverview), on March 12, 2001, and by the City of Trenton (Trenton), on March 13, 2001.⁷ Riverview and Trenton confined their petitions to offering factual allegations in support of the arguments raised by Wayne County and GTW. The four parties seeking revocation are referred to as the Petitioners.

On April 2, 2001, RTR filed a reply addressed to the petitions to revoke filed by the cities of Riverview and Trenton and to the submission of GTW.⁸ In addition, its reply addressed our decision in Jefferson Terminal, supra, served a few weeks earlier on March 19, 2001.⁹ RTR argues that the circumstances of this case differ from those in Jefferson Terminal. RTR points out that in Jefferson Terminal, the City of Detroit had initiated proceedings to condemn the land involved in the case before any action was taken at the agency. Here, RTR notes, no public agency has initiated condemnation proceedings, either before or after RTR filed at the Board. RTR claims that RTR's acquisition and operation of this track come within the scope of the class exemption, citing assertedly applicable agency precedent. RTR also maintains that it has undertaken this transaction to provide container interchange service, not to subvert any condemnation action.

In a decision served on May 15, 2001, we commenced an investigation under 49 U.S.C. 10502(d) and announced a February 15, 2002 deadline for our determination as to revocation of RTR's use of the class completion.

On May 1, 2001, RTR filed a petition in STB Finance Docket No. 34040, seeking an individual exemption for the same transaction pursuant to 49 CFR 1121. The factual and legal issues in the two dockets are the same. RTR states that it filed its petition for an individual

⁷ We previously received statements opposing the exemption from: Trenton, filed February 20, 2001; Riverview, filed February 21, 2001; and the Greater Detroit Heritage River Initiative, filed February 21, 2001. Those statements will not be considered because they do not indicate that they were served on RTR.

⁸ RTR requests that we consider its tendered reply to GTW, which was incorporated into its reply to the cities of Riverview and Trenton. RTR has a right to reply to GTW and was not required to seek special permission to do so. Thus, we will consider RTR's tendered reply to GTW.

⁹ In Jefferson Terminal, we revoked an earlier class exemption notice filed by another Crown subsidiary, involving the development of a terminal at a different location, out of concern that (1) the notice had omitted essential information concerning a condemnation action that had been brought before the notice was filed and (2) our jurisdiction over that transaction was open to substantial question because the track had been out of service for 13 years.

exemption “to put to rest any outstanding concerns that might exist about RTR’s invocation of the class exemption procedure.” RTR proposes a procedural schedule for requesting and analyzing comments on its petition. Attached to RTR’s petition is an environmental report containing environmental documentation that had not been submitted in its class exemption notice in STB Finance Docket No. 33980.

On May 21, 2001, GTW filed a reply to RTR’s petition in STB Finance Docket No. 34040. GTW requests that interested parties be given the opportunity to take discovery from RTR concerning jurisdictional facts, arguing that the procedural schedule proposed by RTR does not allow adequate opportunity for evaluation of this issue. GTW proposes an alternative procedural schedule built around its proposal for discovery. GTW also requests that we consolidate the class exemption and the individual exemption petition dockets because both dockets involve the same transaction, the same property, and the same issues. Wayne County made the same requests in a pleading filed on the same date.

On May 29, 2001, RTR filed a reply in opposition to the requests for consolidation and discovery. RTR maintains that consolidation would lead to unwarranted delay in disposing of the issues in these proceedings.¹⁰ RTR also responds that discovery is unnecessary and that those seeking it failed to make timely use of the opportunity for discovery under 49 CFR 1121.2 when the petitions for revocation were filed in STB Finance Docket No. 33980.¹¹

On October 15, 2001, the Board’s Section of Environmental Analysis (SEA) issued an Environmental Assessment (EA) of RTR’s proposed acquisition of and operation on the McLouth Track. SEA received comments on the EA from the Wayne County Department of Public Services, GTW, the Cities of Trenton and Riverview, and the Southeast Michigan Council of Governments (SEMCOG). SEA addressed those comments in a Post Environmental Assessment (Post EA), which was placed in the public docket on January 22, 2002. The Post EA

¹⁰ The petition for individual exemption in STB Finance Docket No. 34040 has a different deadline under 49 U.S.C. 10502 because it was filed later than the petition to revoke the class exemption in STB Finance Docket No. 33980.

¹¹ On June 19, 2001, the Brotherhood of Locomotive Engineers (BLE) filed a statement giving “notice of its intervention and intent to participate” in STB Finance Docket No. 34040 and STB Finance Docket No. 33980. BLE briefly stated that it supports the requests of GTW and Wayne County for consolidation, establishment of a single procedural schedule, and discovery. On February 13, 2002, BLE submitted comments in support of revocation of the exemption in STB Finance Docket No. 33980 and either dismissal of the petition for exemption or establishment of a procedural schedule in STB Finance Docket No. 34040. RTR replied to BLE’s comments on February 14, 2002.

found that, with the imposition of specified conditions to mitigate the environmental impact of the proposed operations, RTR's proposal would not significantly affect the environment.

Following a hiatus of almost 8 months, in which we received no pleadings in this case, RTR submitted a filing on January 25, 2002, describing the status of a January 15, 2002 hearing in the U.S. District Court for the Eastern District of Michigan and asserting that RTR would not use the facility for handling trash from Canada. That same day, GTW and Wayne County submitted extensive supplemental filings in support of their outstanding petitions to revoke the exemption. They also asked that the petition for individual exemption be dismissed.¹² RTR replied on January 30, 2002. Wayne County filed again on January 30 and 31, 2002, submitting materials that include the transcript of a public hearing on the transaction, a statement by Congressman John Dingell opposing the transaction, and resolutions by the Michigan House of Representatives, the Downriver Community Conference and the City of Wyandotte, opposing the transaction.¹³

On February 4, 2002, Wayne County filed supplemental environmental comments. On February 6, 2002, RTR filed a statement in letter form, urging us to disregard this filing and the filings from GTW and Wayne County described in the preceding paragraph. On February 8, 2002, RTR filed a reply to the February 1, 2002 letter from Congressman Dingell, and Wayne County and GTW jointly filed what they term "reply comments" to "new issues" raised by RTR. On February 12, 2002, RTR filed a reply to the Wayne County and GTW comments filed on February 8, 2002, and, on February 13, 2002, RTR filed a clarification or supplement to its February 12, 2002 filing.

DISCUSSION AND CONCLUSIONS

We will revoke the exemption covered by RTR's notice filed on December 13, 2000, because this proposal warrants more detailed scrutiny than is afforded by the existing record. We will consider the arguments submitted in STB Finance Docket No. 33980 to the extent not addressed here, when we consider RTR's petition for individual exemption that was filed on May 1, 2001, in STB Finance Docket No. 34040. To assist us in ruling on that petition, we will seek additional evidence and arguments from both sides.

¹² GTW and Wayne County also withdrew the request they had filed on May 21, 2001, to consolidate the petitions for revocation with RTR's petition for exemption.

¹³ We also have received a number of letters expressing concern and opposition regarding RTR's proposal from local citizens and their representatives, including letters from Governor John Engler, Majority Floor Leader Bruce Patterson of the Michigan House of Representatives, United States Senator Carl Levin, Congressman John Dingell, and Congresswoman Lynn Rivers.

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier (such as RTR) may acquire a rail line and operate as a common carrier only if the Board makes an express finding that the proposal is not inconsistent with the “public convenience and necessity.” That means the Board must examine and weigh the public interest. Under section 10502, however, we may exempt individual transactions from the requirements of the statute, including section 10901, where full regulatory scrutiny is not required and the transaction or service is limited in scope or the application of the statute is not needed to protect shippers from the abuse of market power. We can revoke an exemption, once granted, in whole or in part when necessary to carry out the national rail policy of 49 U.S.C. 10101. 49 U.S.C. 10502(d).

There are some types of situations in which approval would be so routine that we have a “class exemption” allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, in 1985, the ICC adopted rules in Class Exemption–Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985) (Class Exemption), under which a noncarrier can obtain approval to acquire and operate a line of railroad within 7 days, subject to that authority being later revoked (if our regulatory scrutiny is found to be necessary) or treated as void ab initio (if the exemption notice is found to have contained false or misleading information). The class exemption procedures were adopted to serve shippers and community interests by facilitating continued rail service, on lines that the selling carrier could no longer operate profitably, by new, smaller carriers seeking to provide service more efficiently. See Class Exemption, 1 I.C.C.2d at 812-13, 817. The procedures are designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances, the transactions under this proposal will involve resumed or continued rail service with no change in operations. Class Exemption, 1 I.C.C.2d at 811.

The transaction at issue in this case differs substantially from the type of transaction that the ICC viewed as falling within the scope of Class Exemption. First, it has attracted substantial controversy and opposition, including opposition from public agencies. Second, it would convert private carrier operations into for-hire common carrier service.¹⁴ Such a conversion triggers this agency’s primary jurisdiction, thus withdrawing the service and the property over which it operates from many aspects of local control. And in this case, the issue of local control over the property involved in the case underlies much of the opposition to the proposed transaction. Thus, unlike most cases where Class Exemption is invoked, there are substantial factual and legal

¹⁴ The record indicates that McLouth Steel was not a carrier and did not use the line for common carrier service. Crown did not seek Board authority when it acquired the track from McLouth Steel, which the purchaser would have had to do if the track were rail line subject to our jurisdiction. RTR notes that GTW conducted operations over the track to serve McLouth. But RTR does not suggest that that activity transformed the track into a line of railroad subject to our jurisdiction. The track appears to have been an industrial lead, on which the serving carrier–GTW–picked up and dropped off cars.

issues that have been presented here which require additional scrutiny and the development of a more complete record.

In Jefferson Terminal, we stated that the Class Exemption procedures were not intended to apply to cases in which a noncarrier seeks to convert what could be non-rail property into a rail line. RTR disputes this, pointing out that the Class Exemption embraces all acquisitions by a new carrier. RTR also cites a number of cases where carriers have invoked the class exemption to acquire for rail service private or abandoned track.¹⁵

RTR's arguments overlook the ICC decision promulgating Class Exemption, 1 I.C.C.2d at 812, where the ICC specifically stated:

Under the new rule, class exemptions may still be reviewed by the Commission. Any affected party can file a petition to revoke under section 10505(d) [now section 10502(d)] and attempt to show that regulation is necessary to carry out the rail transportation policy. In light of the explicit legislative directive to grant exemptions and then rely on after-the-fact remedies, including revocation, the potential for total or partial reimposition of regulation is always present.

Here, as in Jefferson Terminal, we are not rejecting RTR's notice as void ab initio in violation of the Class Exemption. Rather, we are revoking the exemption pursuant to the standards of 49 U.S.C. 10502(d), specifically, the need to address the rail transportation policy at 49 U.S.C. 10101(2). That provision states, in relevant part, that, in regulating the railroad industry, it is the policy of the United States Government, while minimizing the need for regulatory control, "to require fair and expeditious regulatory decisions when regulation is required." Based on the circumstances presented in this case, we conclude that more scrutiny is needed here.

A change in the status of the line from private to common carrier service, the effect of such a change on the local community, and the concerns expressed by the local community about that effect require our closer scrutiny of the proposal prior to the issuance of the authorization

¹⁵ All of the cases cited by RTR except one involve a simple publication of a notice of exemption by Board staff exercising delegated authority in uncontested cases. Those ministerial orders contain no findings as to whether the transactions at issue fall within the scope of Class Exemption. The issue in the one adjudication cited by RTR, Effingham Railroad Company–Petition for Declaratory Order–Construction at Effingham, IL, STB Docket No. 41986 (STB served Sept. 12, 1997, reconsideration denied Sept. 18, 1998), aff'd, United Transportation Union v. Surface Transportation Board, 183 F.3d 606 (7th Cir. 1999), was not the applicability of the class exemption, but whether the track in question was a spur under 49 U.S.C. 10906.

that is sought. Obtaining additional information before rendering that decision will allow us to fully address all of the issues that have been raised in this case. Therefore, it is appropriate to revoke the use of the class exemption and consider the merits of the proposal in the context of the petition for individual exemption which RTR has filed.

Contrary to RTR's claims, this approach is consistent with precedent. In Consolidated Rail Corporation—Exemption—Abandonment of the Weirton Secondary Track in Harrison and Tuscarawas Counties, OH, Docket No. AB-167 (Sub-No. 1088X) (ICC served June 14, 1989) (Weirton Secondary), the ICC revoked the application of the class exemption at 49 CFR 1152 Subpart F to Conrail's proposal to abandon a 24-mile segment in the middle of the railroad's 190-mile mainline between Columbus, OH, and Pittsburgh, PA. The abandonment met the standard of the class exemption for out-of-service rail lines, as the line segment had generated no local traffic for more than 2 years and overhead traffic could be rerouted. However, the ICC, noting that the exemption "has proved to be extremely controversial," concluded:

we are unwilling to apply our class exemption to this abandonment. Extensive and legitimate concerns have been raised by numerous State and local government representatives about the importance of the Panhandle line as a through route for existing and potential overhead traffic from the area. These concerns warrant a more thorough review than has been conducted on this record.

In its decision, the ICC pointed out that, in promulgating this class exemption in Exemption of Out of Service Rail Lines, 366 I.C.C 885 (1983), it had said:

This class exemption is intended to provide a simple, expedited procedure for railroads to remove track over lines that have not been operated for years. In almost all instances, these would be noncontroversial, unopposed abandonments.

Similarly, in New England Central Railroad, Inc.—Acquisition and Operation Exemption—Lines Between East Alburg, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 30, 1994) (New England Central), the ICC stayed the effectiveness of a notice of exemption filed by a newly formed noncarrier, the New England Central Railroad, to acquire 325 miles of line from Central Vermont Railway. The proposal had attracted substantial opposition from numerous parties, including the State of Vermont. The ICC stayed the effect of the notice, solicited petitions and replies, and directed an Administrative Law Judge to convene a hearing. After collecting evidence and argument, the ICC issued a full decision on the merits before permitting the transaction to go forward. In doing so, the ICC revoked the exemption in part to provide for the imposition of labor protective conditions not provided in Class Exemption.

In short, Weirton Secondary and New England Central are consistent with our decision here, reflecting the particular circumstances of the case and the expression of significant public concern, to revoke the use of Class Exemption to allow a more searching process and to solicit further evidence designed to elicit a more complete record before permitting the proposed action to go forward. We conclude that this case presents similar circumstances requiring similar action.

In considering the petition for individual exemption,¹⁶ we will consider all of the material submitted in connection with the petitions for revocation not otherwise dealt with here. We also will consider the environmental record at that time. In addition, we request the parties to supplement the record, as specified below.

Specifically, RTR seeks authority to acquire the McLouth Track in order to provide a container interchange service. In support of its request, RTR cites the benefit of this service to shippers and to the public by providing a needed facility, by promoting commerce, and by reducing the number of trucks using roads in the Detroit area. In its additional comments, RTR should support those arguments with evidence from those who would benefit from the interchange service.

Wayne County and the other opponents claim that RTR's proposal is merely an attempt to preclude the condemnation of some or all of the involved property for public purposes. To date, no evidence has been submitted that shows with any specificity what property may be condemned, who would condemn it, under what authority, and for what specific purpose. Nor has Wayne County or any other public body submitted any timetable for condemnation. Wayne County and the other public bodies should provide this information and any other pertinent information on the condemnation issue in their supplemental filing.

Because we are seeking information within the control of the parties, we do not expect either side to seek discovery from the other. Moreover, the revocation proceeding has been pending for a year and the petition for individual exemption for more than 9 months, and no

¹⁶ GTW and Wayne County argue that we should require RTR to file a formal application, citing Ozark Mountain Railroad–Construction Exemption, Finance Docket No. 32204 (ICC served Dec. 15, 1994) (Ozark). That case involved the construction of a new line. In rail construction cases, the filing of a formal application under 49 U.S.C. 10901 entails the submission of extensive financial information in compliance with our regulations. Financial concerns were a major issue in Ozark. In contrast, we have no specific regulations governing the content of applications to acquire and operate rail lines under 49 U.S.C. 10901, and we can proceed with the appropriate regulatory scrutiny in a proceeding for a petition for exemption.

party, to our knowledge, has undertaken discovery in either docket.¹⁷ Thus, we will not look favorably on any motions to compel discovery.

It is ordered:

1. The petitions to revoke the use of the class exemption in STB Finance Docket No. 33980 are granted.
2. Supplemental information in STB Finance Docket No. 34040 addressing the issues specified above will be due on March 7, 2002. Replies will be due on March 18, 2002.
3. This decision is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

¹⁷ Wayne County, in its May 21, 2001 request that we issue a procedural schedule in a consolidated proceeding to consider both the petition to revoke and the petition for exemption, asked that time be set aside for discovery. But Wayne County required no authority from us to undertake discovery if it wished to do so, and it had ample time and opportunity to do so if it wished. Our rules at 49 CFR 1114.21(b) state, “All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval.” We received no motions to compel discovery or any other indication that any party ever sought discovery.